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THE INTERPRETATION OF WILLS—JARMAN'S FIFTH RULE.

AT the close of Jarman's treatise on Wills, the author summed up his conclusions in regard to the principles governing the construction of testamentary dispositions by putting them in the shape of twenty-four carefully phrased rules.

The fifth of these is "that the heir is not to be disinherited without an express devise or necessary implication; such implication importing not natural necessity, but so strong a probability that an intention to the contrary cannot be supposed."[1]

This was not an unfair formulation of expressions which had fallen from time to time from the lips of some of the greatest judges of England. Nevertheless, it aptly illustrates the impolicy of deducing a legal rule from observations found in reported opinions, without first subjecting them to a close and scientific inquiry, based upon the reason of things rather than on the course of judicial authority. The best statements of law ought to be, and generally are, those worked out by legal scholars occupying no official position, and unembarrassed in framing a definition by the pressure of circumstances or the desire to justify the decision of a particular controversy. Particularly is this true of the earlier English judicial definitions, thrown off in the course of an informal opinion, orally delivered and taken down, often with questionable accuracy, by unofficial reporters.

We first catch sight of the germ of Jarman's rule in the pages of Croke.[2] There we find it stated that in the case of Spirt *v.* Bence, determined in 1633,[2] the four Justices of the King's Bench "all agreed that the words in a will which disinherit the heir at the common law ought to have an apparent intent, and not to be ambiguous and doubtful; and that the intent ought to be collected out of the words of the will, and not from any foreign intendment or averment."

[1] 2 Jarman on Wills, *1654.

[2] Croke, Car. I. 369.

Looking at these observations as a whole, it is obvious that the main thought at bottom is that a will must speak for itself, and speak plainly, if it is to divert the line of inheritance. Such an intent is not to be read into it "from any foreign intendment or averment." It is not to be helped out by pleading nor by guessing. The judges are following in the lines laid down, not many years before, by Lord Bacon in bringing out his famous maxims, as to latent and patent ambiguities. A deed, he argued, which left the estate granted uncertain, was not to be held by averment, for that were to pass without deed what by law could pass only by deed. Intention may be pleadable as matter of fact, to solve a question arising upon an equivocal description, but only in connection with material facts from which it can be inferred, and such facts must "stand well with the words" of the will.[1] To use Bacon's own illustration, if "I give lands to Christ Church in Oxford, and the name of the corporation is *Ecclesia Christi in universitate Oxford*, this shall be holpen by averment, because there appears no ambiguity in the words: for this variance is matter in fact, but the averment shall not be of intention, because it doth stand with the words. For in the case of equivocation the general intent includes both the special, and therefore stands with the words; but so it is not in variance, and therefore the averment must be of matter, that do endure quantity, and not intention. As to say, of the precinct of Oxford, and of the University of Oxford, is one and the same, and not to say that the intention of the parties was, that the grant should be to Christ Church in that University of Oxford."[2]

So in Spirt *v.* Bence, the real thought is to use the expressions of Sir James Wigram, that "the judgment of a court in expounding a will should be simply declaratory of what is in the instrument."[3] The Judges were insisting that devises were not to be helped out against the heir by declaring on an intent which had to be looked for wholly outside of anything which the testator had written. To ejectment by the heir against A, who has taken possession under a claim of title by reason of a devise to B, it would

[1] Altham's Case, 8 Rep. 155.

[2] Bacon's Works, Ed. 1803, IV, 80, 81.

[3] Rules as to the Interpretation of Wills, *6, *84.

be a bad plea that the testator had meant A when he named B.

Nearly forty years later Chief Justice Vaughan, in the Common Pleas, pushed on a long step farther. In Gardner *v.* Sheldon[1] he stated his views thus:

"An Estate given by implication of a Will if it lie to the disinheriting of the Heir at Law is not good, if such implication be only constructive and possible, but not a necessary implication. I mean by a possible implication, when it may be intended that the Testator did purpose and had an intention to devise his land to A, but it may also be as reasonably intended, that he had no such purpose or intention to devise it to A. But I call that a devise by necessary implication to A, when A must have the thing devised, or none else can have it. And, therefore, if the implication be only possible, and not necessary, the Testator's intent ought not to be construed to disinherit the Heir, in thwarting the Dispose which the Law makes of the Land, leaving it to descend where the intention of the Testator is not apparently and not ambiguously to the contrary." * * * "And where the words of a Will are of ambiguous and doubtful construction, they shall not be interpreted to the disinheriting of the right heir, as is already shew'd."[2]

As authority for these propositions, the Chief Justice cited Spirt *v.* Bence, quoting from that opinion as follows: "'That the words of a Will which shall disinherit the Heir at Common Law, must have a clear and apparent intent, and not be ambiguous or any way doubtful,' (so are the very words of the Book)." It will be observed, however, that he interpolates "any way" before doubtful, thus giving a decided gloss to the "very words" used by Croke.

Thirty years later, a will came before the King's Bench, in which there was a residuary gift to the executrix of the "overplus" of the estate. It was held that this did not pass the residuary lands.[3] Four opinions were pronounced, in three of which the rule now under consideration received attention. Powell, J., observed that "uncertain words in a will must never be carried so far as by them

[1] Vaughan, 259, 262 (1671).

[2] *Ibid*, 268.

[3] Shaw *v.* Bull, 12 Mod. 593 (1701).

to disinherit the heir at law." Chief Justice Trevor remarked that "where words in a will may be satisfied without carrying an estate from the heir at law, they shall never be construed to disinherit him, for the heir is not to be disinherited at all by any implication but such as are necessary, and without which the words would be rejected as void, and of no sense or signification." Nevill, J., who dissented, agreed that "the words of a will, to disinherit an heir at law, must be very plain and apparent in the will," but thought such an application was apparent in that then before them.

In 1735, Lord Hardwicke, in deciding against an heir, upon a will containing an introductory clause with general words as to the testator's disposing of his "worldly estate," said that "such general clauses have been often allowed as proper to expound the particular devises, and tho' they can't of themselves disinherit the heir at law without plain words, yet they serve very well to explain the testator's intention." This case[1] is cited by Jarman as an authority for his rule, but certainly does not support it, although it refers to Gardner *v.* Sheldon without disapproval.

Ten years later, the strict doctrine as to what was a necessary implication was again pressed on the great Chancellor, and again rejected, with these observations:

"It was said that there must be a necessary implication, and not a probable one only. It is true the court must not take conjecture for implication; there is hardly any case where an implication is of necessity, but it is called "necessary" because the court finds it so to answer the intention of the devisor."[2]

Shortly after the first of these two decisions of Lord Hardwicke, Chief Justice Willes had gone on the bench of the Common Pleas. He took an early opportunity to restate the rule. It was, he said, simply "that the intent of the testator ought to appear plainly in the will itself, otherwise the heir shall not be disinherited." In the form in which it was put in Gardner *v.* Sheldon, if "taken strictly, it would overturn a great many resolutions." Many of these he cites, adding: "But if Vaughan's rule were to hold, there would

[1] Maudy *v.* Maudy, cases *temp.* Hardwicke, 154 (1735).

[2] Coryton *v.* Helyar, 2 Cox, 339, 348 (1745).

be an end of this way of reasoning, and all those cases must be overturned." * * * With Spirt *v.* Bence, he found no fault, remarking that it was "exactly agreeable to the rule which I have laid down in this case, and shews that the rule laid down by Vaughan in the case of Gardner *v.* Sheldon, is a new notion of his, and not the right rule."[1]

Similar views were thus expressed in 1773 by Lord Mansfield:

"It has been said that a necessary implication must mean when there is a natural impossibility that it should be otherwise. There never was such a construction put upon those words. A necessary implication is the implication arising upon the words the testator has made use of which clearly satisfies the court what was his meaning. It is put in opposition to conjecture. Conjecture is when you suppose what would have been the testator's meaning if he had had the whole case before him, and what, if he had thought of such an event, he would have said upon it. That is a conjecture; but for implication you must find out his meaning, whether expressed or implied, from his words." * * * "Necessary implication, therefore, is that which leaves no room to doubt."[2]

It will be observed that the sentence last quoted, if it be consistent with what precedes it, is at least open to misconstruction. Where there is no room whatever for a doubt, the conclusion must be irresistible. It is no longer a question of probability, but of certainty.

In 1788, the question came up again in the King's Bench, when Grose, J., said that "to defeat the heir, it must appear to be the clear intention of the testator collected from the will, either by express words, or necessary implication, that the devisee should take," and Ashhurst, J., added that "courts of law have always so far favored the title of the heir at law as to lay it down as a rule that he shall not be disinherited but by a plain intention, and not by probable intention."[3]

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[1] Moone *v.* Heaseman, Willes, 138, 140-144, and note. S. P. Roe *v.* Wickett, Willes, 303, 309.

[2] Jones *v.* Morgan, K. B. Fearne on Cont. Rem. App., 111, 577, 589.

[3] Doe *v.* Wilkinson, 2 T. R. 213, 224; S. P. Denn *v.* Mellor, 5 T. R. 564.

Mr. Justice Ashhurst intensified this statement of the rule, a few years later, by commencing an opinion in favor of the heir by the remark that "the heir at law must recover the possession of this estate unless some other person be clearly and unequivocally entitled to take under the will."[1]

Soon after Sir James Mansfield became Chief Justice of the Court of Common Pleas, he declared the result of the cases where a devise of an estate was claimed on the one side to be a fee, and on the other but for life, to be "that an heir at law is not to be disinherited unless by words of limitation or by expressions which directly or by inference beyond all doubt shew an intention to give an estate in fee to the devisee."[2] Spirt *v.* Bence he regarded as a misapplication of this rule in favor of the heir, characterizing it as a decision to which he "never could have agreed." A few months later a similar point was being argued in the King's Bench, and counsel cited Gardner *v.* Sheldon as deciding that "the disinheriting of the heir at law is not good, if such implication be only constructive and possible, but not a necessary implication." At this, Lawrence, J., interposed the remark that "that rule is narrowed by Lord C. J. Willes to this, 'that the intent of the testator ought to appear plainly in the will itself, otherwise the heir shall not be disinherited.'" It was rejoined that in the case at bar no such plain intent was shown, but three of the four Justices (Lawrence, J., dissenting) finally held that there was, and gave the estate to the devisee."[3]

It remained for Lord Eldon to say the word which gave the final form and color to Jarman's rule. In Wilkinson *v.* Adam[4] he used this language:

"With regard to that expression 'necessary implication' I will repeat what I have before stated from a note of Lord Hardwicke's judgment in Coriton *v.* Hellier, that in construing a will conjecture must not be taken for implication, but necessary implication means, not natural necessity, but so strong a probability of intention that an intention

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[1] Thomas *v.* Thomas, 6 T. R. 677 (1796).

[2] Doe *v.* Child, 4 East, 345 (1805).

[3] Trent *v.* Hanning, 7 East, 106.

[4] 1 V. & B. 459, 466.

contrary to that which is imputed to the testator cannot be supposed."

It is this which Jarman substantially repeats.

Powell, in his work on Devises, came to nearly the same result. This is his statement of the rule:

"Where a court cannot find words in a will which either expressly or by necessary implication denote the testator's intention beyond the possibility of a doubt, the rules of law directing descents, which are certain, must prevail and cannot be superseded by an uncertain devise."[1]

According to this canon of interpretation, that the heir is to be protected wherever there is the possibility of a doubt, he stands substantially where Lord Eldon put him.

Lord Ellenborough, it may be noted, the year after the decision in Wilkinson *v.* Adam, had given his view of the matter thus:

"The rule of law is peremptory that the heir shall not be disinherited, unless by plain and cogent inference arising from the words of the will.[2]

All the authorities which have been cited assume that there is some rule of law which may be appealed to in any contest between heir and devisee. If so, who made it, and who had a right to make it?

"*Regula est, quæ rem, quæ est, breveter enarrat. Non ut ex regula jus sumatur sed ex jure quod est, regula fiat.*"[3] Lord Bacon, in commenting on this passage in his treatise *De Dignatate et Augmentis Scientiarum*, pushes the thought a step further:

"*Recte jubetur, ut non ex regulis jus sumatur; sed ex jure quod est, regula fiat; neque enim ex verbis regulæ petenda est probatio, ac si esset textus legis; regula enim legem* (*ut acus nautica polos*) *indicat, non statuit.*"[4]

Rules are nothing unless there is a reason behind them, nor unless they are the fair expression of what before was law. The review of the English cases, which has been attempted in this article, indicates that Jarman, while cling-

[1] Powell on Devises, *411.

[2] Doe *v.* Dring, 2 M. & S. 448, 452 (1814).

[3] Dig. L., 17, *de diversis regulis, etc.*, 1.

[4] Works, Ed. 1803, 459.

ing close to certain judicial phrases, has given them out of their proper connection and limitations. His fifth rule has been either approved or cited without disapproval in many American cases.[1] But it is difficult to make it square with what certainly is law, namely, that to ascertain the intention of the testator the words he has used are to be construed favorably *ut res magis valeat quam pereat.* A will is not to be read like a plea in abatement. It is to be interpreted fairly, as to all who are affected by it.

"Words are, at times, but an imperfect vehicle of thought, even when used in oral speech and explained by all that look, tone and gesture can supply. Still more, in the case of the dead, when what they intended to express is to be gathered from a written document, must this meaning be often a matter of probability, rather than certainty. The probability, indeed, on which is rested a devise or bequest by implication must be apparent, and not a mere matter of conjecture; but it need not, even as against the heir, be necessarily such that from the words employed an intention to the contrary cannot be supposed."[2]

Dr. Lieber, in his Legal and Political Hermeneutics defines "interpretation" thus:

"Interpretation is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey; and of enabling others to derive from them the same idea which the author intended to convey."[3]

As applied to written instruments affecting rights of others, this definition must be so far restrained as to make the object of inquiry the intention as manifested by the language used. But with this modification, it is as true as to wills as in respect to any other documents, and if it be sound, Jarman's fifth rule is not.

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[1] See Bradford *v.* Bradford, 6 Wharton, 244; Rupp *v.* Eberly, 79 Pa. St. 141; Gibson *v.* Seymour, 102 Ind. 485; 2 N. E. 305.

[2] Weed *v.* Scofield, 74 Conn.; 49 Atl. 22.

[3] p. 11.